Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
Mobilitie, LLC Petition for Declaratory Ruling	)	

REPLY COMMENTS OF CTIA

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CTIA respectfully submits these reply comments on actions the Commission should take to promote and streamline wireless broadband deployment.[1] The record confirms CTIA's concern that multiple local regulatory barriers are stalling or outright blocking critically needed new infrastructure. The record supports prompt, decisive and comprehensive Commission actions to remove those barriers.[2]

I. INTRODUCTION AND SUMMARY.

The initial comments show both an urgent need and a clear legal basis to remove regulatory barriers to wireless siting. While some jurisdictions process siting applications in a timely manner and impose reasonable fees, the record contains numerous examples of the many obstacles that are impeding the expansion of wireless networks. These examples provide compelling grounds for the Commission to interpret Sections 253 and 332 of the Communications Act to identify and remove those barriers. Prompt Commission action will

[1] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360 (2016) ("Public Notice"). Comments cited herein were filed on or about March 8, 2017 in WT Docket No. 16-421.

[2] CTIA similarly appreciates that the Commission is preparing to consider two additional rulemakings to further modernize its wireless and wireline infrastructure policies. CTIA looks forward to meaningfully participating in those proceedings.

jumpstart substantial new investment in the infrastructure that is urgently needed to meet the nation's growing reliance on wireless broadband and other services – $275 billion in the next seven years according to one recent report by Accenture Strategy.[3] Moreover, the record establishes that the Commission has ample statutory authority to act. It should:

- Reaffirm its longstanding interpretation that Section 253(a) prohibits any law, regulation or practice that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." The Commission should remove uncertainty caused by a few inconsistent court rulings and confirm its test for determining when a regulation is a "substantial barrier" and thus is unlawful.

- Give practical impact to that interpretation and provide needed guidance to courts, wireless providers, and localities by declaring that Section 253(a) at a minimum prohibits (1) express moratoria on the processing of facility applications or the installation of wireless facilities in rights of way ("ROWs"); (2) *de facto* moratoria that block deployment; (3) undergrounding requirements; (4) prohibitions on technology upgrades and/or new poles in ROWs; (5) subjective aesthetic requirements with unfettered ability to reject siting requests; (6) excessive or discriminatory fees; and (7) zoning processes that are applied to wireless facilities but not to other ROW users.

- Declare that a locality's charges for access to ROWs under Section 253(c) must be cost-based and limited to the actual and direct costs associated with application processing and ROW management.[4]

- Declare that regardless of the absolute level of these charges, if they are higher than charges imposed on other ROW users, they unlawfully discriminate among providers and thus separately violate Section 253(c).[5]

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[3] *See How 5G Can Help Municipalities Become Vibrant Smart Cities*, ACCENTURE STRATEGY, at 1 (Jan. 12, 2017), http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf ("Accenture Report"), *attached to* Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-421 (filed Jan. 13, 2017).

[4] Globalstar Comments at 14; Lightower Fiber Networks Comments at 27, 29; Mobile Future Comments at 6; Mobilitie Comments at 17; Sprint Comments at 33, 36-37; WIA Comments at 69; AT&T Comments at 17.

[5] *See* WIA Comments at 2.

- Declare that Section 253(c) also requires localities to disclose the fees they have charged ROW users.[6]

- Interpret Section 332(c)(7) to include a new 60-day shot clock for collocations on structures not covered by Section 6409(a) solely because there is no preexisting antenna or, alternatively, interpret Section 6409(a) to cover eligible collocations on structures without a preexisting antenna.

- Exercise authority under Section 332(c)(7) to adopt shorter shot clocks for localities to act on all new site and collocation permit applications. The unreasonable delays associated with zoning review should be reduced given the increasing deployment of small cells, which should involve much simpler and faster reviews.

- Declare that Section 332(c)(7) prohibits requirements that a carrier must prove a coverage gap or other business need as a condition for processing and granting a siting application.[7]

- Adopt a "deemed granted" remedy for the Section 332(c)(7) shot clocks. The statute and the record support adoption of this remedy, which will speed deployment while fully protecting the interests of localities in managing those deployments.[8]

- Declare that Section 332 applies to siting applications that seek to use ROWs and municipal-owned poles in those ROWs, because localities act in their regulatory capacity when managing ROWs.[9]

- Exclude small wireless facilities from National Environmental Policy Act ("NEPA") and National Historic Preservation Act ("NHPA") reviews.[10]

Numerous localities and organizations representing them flatly oppose Commission action, but they fail to present any credible arguments to substantiate the status quo. The weakness of their comments starkly contrasts with the overwhelming evidence of numerous

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[6] Section 253(c) provides that states may require telecommunications providers "fair and reasonable compensation" for ROW access, provided such charges are levied on a "competitively neutral basis" and are "publicly disclosed." 47 C.F.R. § 253(c); *see also* Comments of Conterra Broadband Services and Uniti Fiber at 23; Lightower Fiber Networks Comments at 27, 29.

[7] Mobile Future Comments at 3-4; Mobilitie Comments at 12-13, 18; T-Mobile Comments at 20.

[8] A number of jurisdictions have already adopted this approach. *See, e.g.*, Kenton County Mayors Group Comments at 1; Lightower Fiber Networks Comments at 13; San Francisco, CA Comments at 26.

[9] *See, e.g.*, CCA Comments at 12; T-Mobile Comments at 30-31; Verizon Comments at 30-31.

[10] *See, e.g.*, CCA Comments at 35-37; CTIA Comments at 47; NTCH Comments at 1, 7; NTCA Comments at 5; Sprint Comments at 44, 47-48; T-Mobile Comments at 36-37.

barriers, long delays, and exorbitant fees that are frustrating investment in new infrastructure. Some deny a problem exists because the industry has successfully deployed many cell towers.[11] They miss the point that, as the Public Notice recognizes, the critical need now is for *additional* facilities that are densely-spaced small cells. In any event, the many examples of long delays, excessive charges, and outright refusals to approve new facilities undercut arguments that the Commission need not act.

Other opponents argue that providers are asking the Commission to preempt their authority to supervise ROW and impose rigid "one-size-fits-all" rules that dictate ROW management and set fees.[12] To the contrary, the proposals put forward by CTIA and others would not wrest control of ROWs away from localities, but would provide guideposts to determine when state or local regulations or fees violate the Communications Act. And others argue that the Commission lacks authority to act, and that localities can set whatever ROW access terms and prices they want.[13] But their position directly conflicts with Sections 253 and 332, which explicitly limit localities' authority to restrict ROW access, impose excessive fees, and regulate the installation of wireless facilities.[14]

The record is clear: swift, definitive Commission action is needed to remove multiple obstacles that are standing in the way of the national priority for ubiquitous, advanced wireless services that will benefit all Americans.

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[11] *See, e.g.*, Austin, TX Comments at 5.

[12] *See, e.g.*, Virginia Department of Transportation Comments at 11; Austin, TX Comments at 3; Columbia, SC Comments at 12-13.

[13] *See* Cities of Coral Gables, Coral Springs, Gainesville, Tallahassee, Tampa, and Winter Haven; Towns of Gulf Stream and Pembroke Park; Florida Association of Counties, Inc.; Florida League of Cities, Inc. ("Florida Coalition of Local Governments") Comments at 10.

[14] *See* 47 U.S.C. §§ 252, 332.

II. THE RECORD CONFIRMS THAT NEW WIRELESS INFRASTRUCTURE IS NEEDED – BUT THAT NUMEROUS LOCAL BARRIERS ARE IMPEDING IT.

A. New Investment Nationwide in Wireless Networks is Essential to Meet the Public's Exploding Demand for Wireless Services, and Will Generate Substantial Economic Benefits.

The record bears out the Public Notice's observation that promoting investment in broadband services directly serves the public interest. Parties document the economic, social, and other benefits broadband delivers – benefits that will grow even larger when 5G is introduced.[15] The record also demonstrates a direct link between the availability of broadband services and ROW access.[16] Without that access, advanced wireless services will be delayed or not offered at all.[17]

Groups representing minorities note that increasing broadband's availability is particularly important for connecting low-income and minority Americans because data show that these groups are particularly dependent on wireless devices and services.[18] As highlighted by the U.S. Black Chambers, "no longer considered a luxury, wireless broadband has become a lifeline," and a crucial part of economic opportunity and success for individuals and

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[15] ITIF Comments at 2; Tech Freedom Comments at 3-4; Verizon Comments at 1-2; T-Mobile Comments at 10-11.

[16] ITIF Comments at 1-2. Indeed, the Commission has recognized this in the past, noting in a 2011 infrastructure Notice of Inquiry that "[p]ublic rights of way are especially critical to the deployment of communications facilities due to their widespread availability and efficiency for use in deploying communications networks. . . . The limited alternatives that exist for the placement of communications networks are often less efficient or have other drawbacks." *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, 26 FCC Rcd 5384, 5386, n.9 (2011).

[17] WISPA Comments at 2-3 ("[U]nnecessary regulations and obstacles by State and municipal governments delay the ability of Americans to receive fast Internet service and force Internet providers to spend money that could have otherwise been spent deploying next-generation technologies.").

[18] U.S. Black Chambers Comments at 1; Latino Coalition Comments at 1-2.

businesses.[19] Further delays of broadband deployment caused by municipalities will delay the closure of the digital divide.[20] The U.S. Black Chambers and the Latino Coalition[21] urge the Commission to act to lower any barriers that stand in the way of robust broadband investment.

The benefits of broadband investment to the economy are also clear. CTIA submitted into the record of this proceeding a report by Accenture that quantifies the economic benefits of 5G, concluding that "this next generation of wireless technology is expected to create 3 million new jobs and boost annual GDP by $500 billion, driven by a projected $275 billion investment from telecom operators."[22] These benefits will be brought to large and small cities alike.

B. The Record Reveals Numerous Barriers Impairing That Investment.

In its Public Notice, the Commission sought data on three potential types of barriers: (1) laws, rules or practices that block or deter deployment; (2) delays in acting on permits and other required authorizations; and (3) fees.[23] The record contains substantial data on all three and supplies ample grounds for the Commission to interpret Sections 253 and 332 to remove these barriers.

Some localities process siting applications promptly and do not impose high fees. CTIA commends these localities for partnering with industry to promote broadband deployment and the benefits it brings to their citizens. But these localities stand in sharp contrast to the many other localities that *are* imposing obstacles. Moreover, the fact that some localities work with

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[19] U.S. Black Chambers Comments at 1.

[20] *Id.*

[21] U.S. Black Chambers Comments at 1; Latino Coalition Comments at 1-2.

[22] Accenture Report at 1.

[23] Mobilitie Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of W*ay, WT Docket No. 16-421 (Nov. 15, 2016).

carriers to deploy new facilities underscores that the Commission can and should take actions that align with these localities' practices. For example, the fact that many localities process ROW permits in less than 60 days provides a metric for adjusting the shot clocks.[24]

Some parties assert there is no need for the Commission to act because wireless facilities are already extensively deployed.[25] These parties ignore the imperatives that require many *additional* facilities nationwide, including the skyrocketing demand for broadband and, with the use of high-band spectrum, the need for more densely packed cell sites. The network deployment build of 5G will involve 10 to 100 times more antenna locations than 4G or 3G.[26] As the Accenture Report shows, localities that obstruct new deployment cost their citizens jobs and cost their economies the benefits of significant capital investment, which will flow elsewhere.[27] Although localities may believe they may be serving the public interest of their communities by attempting to collect additional revenues in the short term, they are disadvantaging consumers for years to come. Every commenting service provider documents how it is being prevented from deploying needed new facilities.

Other localities wrongly assert that it is reasonable for them to enact moratoria on new facilities in ROWs or to impose practices that block new facilities because they need time to adopt new policies governing ROW access. But the wireless industry's need for and interest in deploying small cells in ROWs is hardly new; these deployments have been occurring for several

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[24] Kenton County Mayors Group Comments at 7; T-Mobile Comments at 24 (citing Minn. Stat. § 15.99(2)(a); Fla. Stat. § 365.172(13)(d)(1); N.H. Rev. Stat. Ann. § 12-K:10; Wis. Stat. § 66.0404(3)(c); S.B. 1282, 2017 Sess. (Va. 2017).

[25] *See, e.g.*, San Francisco, CA Comments; *see also* Austin, TX Comments ("The reality in Austin is that more than 175 macro cell towers and 70 macrocell placements on facilities have been deployed.").

[26] Accenture Report at 1.

[27] *Id.* at 1, 13-15.

years. Moreover, NATOA and other organizations representing localities, as well as CTIA, have held programs, webinars, and other events to discuss small cell technologies and the need for ROW access.[28] No city can legitimately claim it has had insufficient time to adopt procedures. This is an invalid excuse for inaction.

C. Certain Local Laws and Practices Are Blocking Deployment.

Parties identify dozens of local regulatory barriers, in the form of laws, regulations, or practices, which either expressly prohibit or have the effect of prohibiting new service and thus violate Section 253(a).

- **Express moratoria.** The record identifies laws that expressly prohibit new wireless deployments for long and in many cases indefinite time periods.[29]

- ***De facto* moratoria.** Other localities may not have enacted ordinances that put new deployments on hold, but in practice they are not considering new siting applications. These *de facto* moratoria equally block deployment.[30]

- **Undergrounding ordinances.** Some jurisdictions require all telecom facilities to be placed underground.[31] This is impossible for wireless networks, which require over-the-air transmission. These ordinances thus operate as effective prohibitions that are also unlawful because they discriminate against wireless technologies.[32]

- **Prohibitions on network expansion.** Some jurisdictions prevent wireless infrastructure providers and carriers from upgrading their existing equipment to accommodate new spectrum technologies or impose severe restrictions on the dimensions of new equipment, which has the same practical impact as outright bans on new sites. Others impose unreasonable and unbounded aesthetic

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[28] *See, e.g.*, Public Notice, FCC and NATOA Announce Workshop on DAS / Small Cell Deployment (Mar. 25, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DA-16-315A1.pdf.

[29] Mobilitie Comments at 10-11.

[30] Lightower Fiber Networks Comments at 10; Mobile Future Comments at 3-4; Mobilitie Comments at 11-12 (for example, some localities have ceased processing siting applications until the FCC's proceeding and/or state legislatures have acted).

[31] *See, e.g.*, Westleigh Community Comments at 1-4.

[32] CTIA Comments at 26-27; Sprint Comments at 20-21; WIA Comments at 70; Verizon Comments at Appendix A; AT&T Comments at 10-11 (citing *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008)).

> requirements and retain complete discretion to deny a facility based on a subjective determination of visual impact.[33]

These obstacles are not merely slowing necessary infrastructure investment or making it more expensive – they are outright blocking it. These are precisely the types of regulatory barriers that Congress acted to prohibit.

D. Some Localities Impose Lengthy and Unjustified Delays.

The record also contains numerous examples of the long time periods that many localities take to authorize wireless facilities in ROWs.[34] Given the much smaller dimensions of small cells and the frequent use of existing structures to hold them, small cell siting should be much faster, but it is often slower. Many providers point out that a major source of delay is the requirement many localities impose that the provider enter into a franchise or other license agreement as a prerequisite to filing individual site applications.[35] While these agreements impose multiple requirements and fees on the provider, they do not grant it a right to build anything at all. This agreement process adds an entire layer of bureaucracy on locating facilities in ROWs. Even after it secures a franchise or license agreement, the provider must then file individual permit applications – each of which requires extensive time to process and may incur delays – with no assurance that the locality will grant any particular application.

Commenters show that some localities add yet another bureaucratic obstacle – zoning review – to this already lengthy process, even though no other ROW occupants had to secure

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[33] CTIA Comments at 12-14; AT&T Comments at 4, 15-16; Crown Castle Comments at 12-13; CCA Comments at 29-30 (one city in Virginia requires antennas with dimensions exceeding 1400 square inches to obtain special approval, which can sometimes require two public hearings).

[34] Sprint Comments at 28-30; Verizon Comments at Appendix A; WIA Comments at 5-6.

[35] Sprint Comments at 29-30 (explaining, there are some cities that require a franchise agreement before considering applications, but then will not negotiate the terms of a franchise agreement); T-Mobile Comments at 6-7.

zoning approval for their new poles or installations.[36] According to ExteNet, during a period of two years, "41 percent of the communities applied to by ExteNet demanded that ExteNet's applications be subject to some form of discretionary review, with 36 of the 41 communities requiring ExteNet to go through formal zoning."[37] Furthermore, many of these communities "demand[ed] that any installation that involves an antenna, even in the public rights of way, must go through zoning."[38]

Lastly, parties also explain that the current Commission shot clocks are often ineffective because if the locality fails to act, the carrier's remedy is to file suit, which only begins what can be an interminable period of litigation. According to Lightower Fiber Networks, as of the day its comments were filed, it had 190 siting applications that were pending for 475 days on average.[39]

Multiple and overlapping franchising, zoning, and permitting requirements force wireless providers to undergo long, burdensome, and expensive reviews. The fact that other ROW occupants often are not subjected to such multiple requirements creates a competitive disparity that further underscores why Commission action is essential.

E. Some Localities Charge Excessive and Discriminatory Fees.

Commenters also supplied extensive, detailed evidence of the high fees that localities demand as a condition to allowing ROW access.[40] The amount of ROW fees varies

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[36] *See* ExteNet Systems Comments at 7-8; AT&T Comments at 23; Verizon Comments at 18-19.

[37] ExteNet Systems Comments at 7.

[38] *Id.*

[39] Lightower Fiber Networks Comments at 3 (Furthermore, "[i]n 12 of the 46 municipalities exceeding 150 days in their consideration of Lightower's deployment request, representing 101 small cells, more than a year has passed. In five of these 46 jurisdictions, representing 34 pending small cells, Lightower has spent more than two years trying to gain approval.").

[40] Crown Castle Comments at 11-14; CTIA Comments at 14; AT&T Comments at 21; Sprint Comments at 25-26; CCA Comments at 16.

tremendously across localities, even among localities in the same state or area, which strongly suggests that the higher fees are not tied to the localities' costs.[41] The data reveal that a number of localities are aggressively demanding the highest possible fees[42] and view ROW access as an opportunity to raise revenues. Providers also submitted data showing that fees imposed for small cell facilities are higher than the fees that were charged other ROW users.[43] This disparity underscores that many ROW fees are not being set based on localities' costs but rather on what they can collect. The outcome is that carriers are forced to make an unfortunate choice: "pay excessive rates (thus reducing the number of facilities the carrier can deploy), delay deployment while attempting to negotiate a fair rate, or abandon plans to locate small facilities in the jurisdiction altogether."[44]

III. THE COMMISSION SHOULD AFFIRM ITS INTERPRETATION OF SECTION 253 AND APPLY THAT INTERPRETATION TO SPECIFIC PRACTICES THAT IMPEDE WIRELESS DEPLOYMENT.

There is broad agreement among small and large wireless providers and infrastructure providers that the Commission should issue a declaratory ruling interpreting Section 253 to

[41] WIA Comments at 19; Tech Freedom Comments at 5; Conterra Broadband Services and Uniti Fiber Comments at 19-20.

[42] Verizon Comments at Appendix; Crown Castle Comments at 11-14 (different jurisdictions across the same state have dramatically different fees; in negotiations to renew a ten-year-old license, one city has proposed a 2100% increase in fees); CTIA Comments at 14; AT&T Comments at 21; Sprint Comments at 25-26; CCA Comments at 16.

[43] Crown Castle Comments at 14 ("Many other jurisdictions discriminate against right-of-way small cell installations while permitting infrastructure for other utilities in the same zones."); Verizon Comments at 8-10, Appendix; Conterra Broadband Services and Uniti Fiber Comments at 8; 21-22 ("[I]t is common to encounter schemes requiring that CFPs pay double what incumbents pay for the same access to right-of-way."); WISPA Comments at 7-8.

[44] Verizon Comments at 9.

streamline wireless siting.[45] The record demonstrates the multiple benefits such a ruling would have in promoting the Act's objectives, setting consistent nationwide policy, and eliminating uncertainty and disputes that are frustrating investment in needed wireless infrastructure. Importantly, no locality or group representing localities challenged the Commission's authority to issue a declaratory ruling to interpret the Act to achieve these objectives.

First, the Commission should reaffirm its longstanding interpretation that Section 253(a) prohibits governmental actions that materially limit a provider's ability to compete, and also confirm that Section 253(a) applies to wireless providers. Second, it should specifically identify as barred under Section 253 those practices that the record shows are effectively prohibiting new service. Third, it should reject the invalid argument that localities have an unfettered right to set the terms and prices for granting access to ROWs for wireless facilities.

A. The Commission Should Prohibit Actions that Materially Limit a Provider's Ability to Compete.

The Commission should reaffirm its longstanding interpretation of Section 253(a) in *California Payphones* and declare that Section 253(a) prohibits any law, regulation, or practice that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[46] It should further declare that a law, regulation or practice "materially inhibits or limits" a carrier's ability to compete if it imposes a "substantial barrier" to deployment.[47]

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[45] WIA Comments at 1; AT&T Comments at 4-5; Conterra Broadband Services and Uniti Fiber Comments at 15-16; Sprint Comments at 13.

[46] CTIA Comments at 22 & n.40 (citing *California Payphone Association Petition for Preemption of Ordinance No. 576NS of the City of Huntington Park, California*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14195, 14206 (1997) ("*California Payphone*")).

[47] *Id.*

Parties show that some courts have interpreted Section 253(a) too narrowly by holding that the challenged regulation must actually prohibit service to be unlawful, while other courts have ruled that the determinative issue is whether the effect of the regulation is to deter service. The Commission should remove the uncertainty created by these decisions and confirm its test for determining when a regulation is an unlawful barrier. That test is fully anchored in Section 253(a)'s language and purpose.

The "materially inhibit/substantial barrier" standard supplies a meaningful but flexible standard for resolving future siting issues. The Commission cannot anticipate every local action that may violate Section 253(a). But with this standard in place, it will provide parties and courts with a single, clear benchmark for evaluating that action. Because the Commission's interpretation is supported by the language of Section 253(a), the agency should reaffirm it.

At least one locality wrongly asserts that Section 253 does not apply to wireless facilities because those facilities are governed by Section 332(c)(7) of the Act.[48] The plain language of the statute contradicts this argument, however, because the provision applies to any requirement that "may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service," which clearly includes entities that transmit wireless traffic. The locality cites no Commission or court ruling that deprives wireless carriers of the protections of Section 253. Moreover, Section 332(c)(7) operates in tandem with Section 253 to impose specific procedures for review of "personal wireless services" facilities. It does not carve out those facilities from Section 253. The Commission should accordingly confirm that the protections of this provision encompass wireless services.

[48] *See, e.g.*, Newport Beach, CA Comments at 1.

B. The Commission Should Prohibit Specific Barriers Identified in the Record.

The Commission should supply providers and localities with practical guideposts to address and prohibit local regulations or practices that go beyond those limits. Providing this clarity will help resolve disputes that are hampering broadband deployment along ROWs today and head off future disputes. The record demonstrates that localities invoke a variety of regulations and practices that effectively hinder deployment. In particular, the Commission should rule that Section 253(a) prohibits the following:

- **Enacted moratoria.** There can be no question that laws and ordinances imposing moratoria on new facilities in ROWs violate Section 253(a).

- ***De facto* moratoria.** Some localities have implemented *de facto* moratoria by refusing to permit new wireless facilities in ROWs, indefinitely delaying approval of those facilities, or refusing to allow upgrades to existing facilities needed to provide capacity to meet rapidly growing consumer demand.[49] These practices are equally in violation of Section 253(a)'s prohibition on practices which "may prohibit" service, because they have the same result – carriers are blocked from providing service.

- **Undergrounding requirements.** Requiring all communications facilities to be located underground is, like a moratorium, a *per se* violation of Section 253(a) because it does not permit use of ROWs for wireless facilities.[50] Localities cannot persuasively argue, let alone demonstrate, that such ordinances are lawful.

- **Prohibition on new poles in ROWs.** The record shows that some localities may allow antennas to be attached to *existing* poles, but bar any *new* poles. This practice also effectively prohibits service and thus violates Section 253(a). As parties demonstrate, the practice intrudes on a provider's right under the Act to design its wireless networks.[51]

- **Unreasonable aesthetic requirements.** Commenters demonstrate that some localities are refusing to approve wireless facilities in ROWs for vague and

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[49] WIA Comments at 5-6 (one member company reports that more than 70 percent of its applications exceeded the 90-day shot clock and 47 percent of wireless attachment applications for existing poles exceeded the 150-day shot clock for new poles).

[50] Sprint Comments at 21; CTIA Comments at 26-27; WIA Comments at 70; AT&T Comments at 10-11 (citing *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008)).

[51] Verizon Comments at Appendix A; WIA Comments at 69-70.

subjective aesthetic reasons, which are often applied discriminatorily.[52] Some localities condition ROW access on their reservation of discretion to deny any facility on appearance grounds, but fail to specify any objective standards for denial. Commenters show that denying facilities applications on these grounds effectively prohibits new service.[53] The Commission should declare that such unreasonable and unbounded aesthetic requirements run afoul of Section 253(a).

- **Unreasonable fees.** Commenters demonstrate that excessive or discriminatory ROW fees materially inhibit investment in new facilities and thus violate Section 253(a).[54] A Commission ruling that prohibits such fees – while still allowing localities to recover their costs of issuing permits and managing the ROWs – achieves the balance Congress struck between promoting rapid deployment of new services and protecting localities' interests.

- **Zoning or other requirements not imposed on other ROW users.** Forcing providers to secure zoning approvals to install small cells in ROWs on new or existing poles or other structures is flatly discriminatory because it imposes burdens on one competitor but not others.[55] The Commission should declare that the practice violates the nondiscrimination provision of Section 253(a). Doing so will not restrict localities' decision to require zoning procedures for the use of ROWs – but if they do so, they must apply those procedures to all users even-handedly. The Commission should declare that other requirements that are imposed on wireless providers but not on utilities or other ROW users similarly violate Section 253(a).

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[52] AT&T Comments at 4, 15; WIA Comments at 41-42.

[53] AT&T Comments at 16 ("[A]esthetic requirements can likewise materially inhibit or limit the ability to provide wireless service, especially if, without an engineering or safety justification, they limit the configuration of equipment so severely as to preclude its deployment technically or require extraordinary efforts to enable a deployment."); WIA Comments at 42.

[54] Sprint Comments at 23, 25-26; AT&T Comments at 19-21; WIA Comments at 64; CCA Comments at 15.

[55] These requirements also cause significant delays. WIA Comments at 12 (explaining that one county near San Francisco takes 150 days for architectural board review for each application as part of the zoning review).

C. Localities Do Not Have Blanket Authority That Overrides Section 253(a).

Some localities claim they have the exclusive and unfettered "proprietary" right to set the terms and prices for ROW access, including barring new deployment, and that the Commission is thus powerless to put limits on that right.[56] They are incorrect for multiple reasons.

Localities managing ROWs are not like landowners that control private property.[57] To the contrary, courts have held that ROWs serve a *public* interest, not a private one, and localities must manage ROWs as a public trust to serve the public interest.[58] In this case, that interest is to facilitate a national wireless infrastructure that will support the public's demand for, and reliance on, wireless communications. ROWs are the *public's* property, and localities must manage them to benefit the public. For that reason, localities act in their regulatory capacity by enacting ordinances and regulations that are voted on by city councils and other bodies to govern ROW access and use. As Sprint points out, the historic purpose of managing ROWs is to maximize their use by subsidizing the installation of services that benefit the public – not by maximizing fees like a private building owner.[59]

The pre-1996 cases that some parties cite are superseded by Section 253.[60] Whatever relevance pre-1996 cases may have had as to localities' authority to block telecommunications deployment, Congress explicitly determined that year to adopt as national policy the promotion

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[56] *See, e.g.*, Florida Coalition of Local Governments Comments at 10; *see also* League of Minnesota Cities and the Minnesota Municipal Utilities Association Comments at 13; San Antonio, TX Comments at 14-16; Texas Municipal League Comments at 6; Smart Communities Siting Coalition at 52-53.

[57] CTIA Comments at 43-46; T-Mobile Comments at 30; CCA Comments at 26; Crown Castle Comments at 27.

[58] Sprint Comments at 34; T-Mobile Comments at 31-33.

[59] Sprint Comments at 34.

[60] For example, some parties relied on the case of *St. Louis v. Western Union Telegraph Company*, which was decided by the court in 1893. *See, e.g.*, Arlington, TX Comments at 7; National League of Cities, *et al*. Comments at 17-20.

of telecommunications services and to outlaw laws or regulations that "may prohibit or have the effect of prohibiting" those services.

Some localities assert that the Commission cannot preempt them from managing use of ROWs, but localities' authority to manage ROWs to protect public safety, manage traffic, and provide other public benefits is not the issue here. Rather, the basis for a Commission ruling arises from some localities' actions to block new wireless facilities through moratoria and other blanket bans, to impose conditions that make deployment technically or economically infeasible, and to demand discriminatory fees that are unrelated to ROW management. The record shows that those practices are impeding critically needed network infrastructure, and the Commission has equally clear legal authority to address those practices.

In short, localities do not establish a valid legal basis for their claim that they have unilateral authority over ROW access. To the contrary, Congress explicitly limited that authority to promote the deployment of new communications services that would, in turn, provide more competition and more consumer choice. Decisive action prohibiting each of the barriers discussed above is fully consistent with the language and purpose of the Act.

IV. SECTION 253(C) DOES NOT ALLOW CHARGES THAT EXCEED A LOCALITY'S COSTS TO ISSUE PERMITS AND MANAGE RIGHTS OF WAY OR THAT DISCRIMINATE AMONG PROVIDERS.

Wireless providers, infrastructure providers, and third-party groups support all three of Mobilitie's requests in its petition for declaratory ruling. They show why the Commission has authority to declare that "fair and reasonable compensation" means payment that compensates a

locality for its actual and direct costs, and why that ruling will provide consistency and certainty to providers and localities and speed siting.[61]

Wireless providers, infrastructure providers, and third-party groups also explain why the Commission has authority to rule that, whatever those "reasonable costs" are, a locality may not charge a wireless provider or new entrant more than it charged other providers, because doing so would violate Section 253's admonition that fees must be "competitively neutral and non-discriminatory."[62] Finally, they support the request that the Commission rule that the phrase "publicly disclosed" in Section 253 means that localities must disclose the fees they charged other providers.[63] Such transparency is critical if the other phrases in that provision are to be effective.

Localities do not attempt to demonstrate that the Commission lacks authority to adopt these three interpretations of Section 253(c). None, for example, explain why that provision allows them to not disclose the fees they charge, or to charge new ROW users far more than prior users. Instead, they make arguments that are factually incorrect or boil down to the erroneous claim that they have a unilateral right to set whatever fees they want.[64]

First, some localities raise a red herring: that the Commission is being asked to impose "one size fits all" or "cookie cutter" requirements for fees that would dictate to localities what

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[61] Sprint Comments at 23; Verizon Comments at 11; AT&T Comments at 20-21.

[62] 47 U.S.C. § 253; Sprint Comments at 35; AT&T Comments at 21-22; Verizon Comments at 14.

[63] Sprint Comments at 35; WIA Comments at 70 (municipal fees should be "publicly disclosed in advance"); Verizon Comments at 18.

[64] Smart Communities Siting Coalition Comments at 9 ("[T]he Commission cannot dictate rents charged for proprietary property, or (consistent with the Constitution) limit recovery to marginal costs as is apparently requested by Mobilitie.").

they can charge.[65] But commenters are not asking the Commission to set fees,[66] recognizing that different cities may have different costs. None suggested that localities should not be entitled to recover their costs, or that (as some localities incorrectly suggested[67]) the localities should subsidize wireless providers. Mobilitie and those commenters simply asked that, whatever a particular locality's costs were, its fees must be tied to those costs. This result implements the language and purpose of Section 253(c) to prevent excessive ROW fees while allowing fees to be based on each city's actual and direct costs.

Second, other localities argue that because Section 253(d) authorizes the Commission to preempt a legal requirement that violates Sections 253(a) and (b), but does not refer to Section 253(c), the Commission cannot preempt a city from imposing particular fees.[68] But Mobilitie and other wireless providers are not seeking preemption of any locality's ROW fees; rather they ask the Commission to interpret several terms and phrases in the statute.[69] And the Commission has unquestionable authority to interpret the Act. In any event, wireless providers show why excessive and discriminatory ROW fees separately violate Section 253(a) – and thus can be preempted under Section 253(d) – because they have the effect of prohibiting service, and Section 253(d) expressly grants the Commission authority to preempt such barriers.[70]

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[65] Virginia Department of Transportation Comments at 11.

[66] *See, e.g.*, Verizon Comments at 14.

[67] Community Wireless Consultants Comments at 4; Ottawa County Road Commission Comments at 1.

[68] Smart Cities Comments at 56; New York City Comments at 8.

[69] As Mobilitie stated in its Petition, it is not "seeking preemption of any specific state or local law or regulation." Petition at 6, n.10.

[70] *See, e.g.*, T-Mobile Comments at 13 ("additional charges or those not related to actual use of the ROWs, such as fees based on carriers' revenues, must be declared per se unreasonable actions that "prohibit or have the effect of prohibiting services.").

Third, others argue that they are entitled to impose a "market" rent or other charge, but cite no legal basis for a right to do so.[71] This argument also ignores the fact that there is no "market" for ROW access – localities have monopoly control over ROWs.[72] They essentially assert the right to demand monopoly rents.[73] Section 253(c) grants no such right.

Finally, other localities take the extreme position that they may set whatever fees they want because they have "proprietary" rights over ROWs.[74] As discussed above, numerous commenters effectively rebut this claim in the context of obstacles many cities have created in violation of Section 253(a).[75] The claim is equally invalid as to Section 253(c). Were a locality free to impose whatever fee it wanted without limit, Section 253 would be effectively nullified.

There is no persuasive rebuttal to the request to interpret Section 253(c) to outlaw such discrimination, and this request should be granted. The nondiscrimination mandate of Section 253(c) does not require that different types of access must be priced the same. But the record shows examples of wireless providers being required to pay fees to install small cells on ROW poles that were not imposed on utilities that installed their own wireless equipment on poles.[76] According to T-Mobile, "[e]ighty percent of jurisdictions in T-Mobile's experience treat DAS

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[71] *See, e.g.*, Newport Beach Comments at 1; Oakland County Comments at 9; San Antonio, TX Comments at 27-28.

[72] Verizon Comments at 15 (explaining "[i]n many other cases, market forces are sufficient to ensure reasonable rates. But those competitive options do not exist for access to rights-of-way.").

[73] AT&T Comments at 18; ExteNet Comments at 41; Sprint Comments at 33; Tech Freedom Comments at 5; WIA Comments at 69; Conterra Broadband Services and Uniti Fiber Comments at 7; NTCA Comments at 3-4.

[74] Florida Coalition of Local Governments Comments at 10; *see also* League of Minnesota Cities and the Minnesota Municipal Utilities Association Comments at 13; San Antonio, TX Comments at 14-16; Texas Municipal League Comments at 6; Smart Communities Siting Coalition at 52-53.

[75] *See supra* Section III.C.

[76] T-Mobile Comments at 7; *see also* Crown Castle Comments at 14.

and small cell deployments on poles in ROWs differently than they treat similar installations by landline, cable, or electric utilities."[77] That is precisely the type of discrimination that Section 253(c) prohibits, and the Commission should confirm that.

There is also no opposition to the request that the Commission should interpret Section 253(c) to require localities to disclose the fees they have charged and the basis for those fees to any new ROW applicant. Transparency enables providers to ensure the rates they are being charged are consistent with the statute.

V. THE COMMISSION SHOULD STRENGTHEN THE SHOT CLOCKS, CONFIRM THEY APPLY TO ROW ACCESS, AND PROVIDE GUIDEPOSTS FOR COMPLIANCE.

A. Reduce the Shot Clocks for all Facilities.

The comments support the Public Notice's observation that the current shot clocks "may be longer than necessary and reasonable to review a small cell siting request" because "small cells may have less potential for aesthetic and other impacts than macrocells."[78] The record also suggests that shot clocks for macrocells also may be longer than necessary. The Commission should exercise its authority to determine what is a presumptively reasonable period of time to act under 332(c)(7) by substantially shortening the existing shot clocks.

Every industry commenter supports much shorter shot clocks. Some address only small cells and demonstrate that a 60-day period is reasonable.[79] Others, including CTIA, advocate tightening the shot clocks for all facilities, noting that the evolution toward small cells means that

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[77] T-Mobile Comments at 7.

[78] Public Notice at 13371; CTIA Comments at 18; WIA Comments at 3.

[79] Crown Castle Comments at 37; ExteNet Systems, Inc. Comments at 19; Lightower Fiber Networks Comments at 23; Mobile Future Comments at 4-5.

fewer macrocell sites are now being constructed and localities also have long experience with them.[80] Both approaches are supported by the record and consistent with the Public Notice.

Those localities that addressed processing times do not dispute the Commission's statutory authority to set shot clocks.[81] Instead, they argue that the existing periods were appropriate. But they fail to explain why time frames adopted to install macrocell sites are also reasonable for antennas that are no more than a few feet tall. There also are several examples of localities that process small cell and macrocell siting requests in less time than the shot clocks presently allow, suggesting that a reduction in the timeframes is both appropriate and feasible.[82]

The Public Notice sought input on whether the Commission should adopt different shot clocks for "batch" processing of small cell applications. Wireless commenters oppose adopting different time frames.[83] CTIA agrees. Different shot clocks are not warranted and would complicate the process by adding additional timelines. Some localities may find batch processing to be more efficient and may request carriers to submit applications in groups, but they should not be allowed to extend the shot clocks in return for batch processing. Instead, the Commission should "follow the lead of states that have recently adopted small facility statutes that apply the same shot clock to batch applications that applies to single applications."[84]

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[80] CTIA Comments at 36-38; Mobilitie Comments at 18-21. In particular, CTIA urged the Commission to shorten the timelines under Section 332(c)(7) for siting facilities on existing non-tower structures without an antenna (from 90 days to 60 days) and for requests for new support structures or substantial modifications (from 150 days to 90 days). CTIA Comments at 36.

[81] *See, e.g.*, Smart Communities Siting Coalition Comments at 46-48.

[82] *See, e.g.*, Louisville, KY Comments at 6; San Francisco, CA Comments at 2.

[83] *See, e.g.*, Verizon Comments at 27; Crown Castle Comments at 37-38; Sprint Comments at 43-44.

[84] *Id.*

B. Apply a 60-Day Shot Clock to Collocations Not Covered by Section 6409(a).

CTIA demonstrated why the Commission should interpret Section 332(c)(7) of the Act to add a new 60-day shot clock for collocations on non-tower structures that would otherwise be covered by Section 6409(a) but for the absence of an existing approved antenna.[85] CTIA continues to support this approach. In the alternative, however, the Commission could revise its Section 6409(a) shot clock and determine that an eligible facilities request for collocation under Section 6409(a) should include collocations on non-tower structures that may not already have an existing antenna.[86] Section 6409(a) collocation requests are non-substantial and the additional shot clock would merely apply the same 60-day processing period to similar non-substantial collocations on non-tower structures that lack an existing approved antenna.

C. Adopt a Deemed Granted Remedy for the Section 332 Shot Clocks.

The current Section 332 shot clock process is often ineffective in achieving its objective of streamlining siting because it only creates a presumption of reasonableness which then requires a carrier to sue a city that exceeds the timelines. Alternatively, as described by AT&T, "[m]any applicants, wary of the cost, inherent delays, and uncertainty of litigation and hopeful of a more direct and less contentious path to approval, agree to tolling or other demands from local officials."[87] And, as CTIA and others demonstrated, while some courts have issued injunctive relief after localities failed to act within the shot clock timeframe, others have required applicants to go back to the locality and wait for the locality to act on the application.[88] These costs and

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[85] CTIA Comments at 17.

[86] CTIA Comments at 34-35; Verizon Comments at 27-30.

[87] AT&T Comments at 25.

[88] CTIA Comments at 44; *see also* WIA Comments at 61-62 ("courts faced with shot clock claims have failed to provide a meaningful remedy"); ExteNet Systems, Inc. Comments at 19.

practical difficulties simply cause wireless providers to give up on deployment, which fails to achieve the statute's objectives. Interpreting Section 332 to include a deemed granted remedy will rectify this problem.[89]

Localities' contention that the Commission is without authority to take this action[90] ignore the fact that the Supreme Court in *City of Arlington* squarely affirmed the Commission's authority to interpret Section 332(c)(7) in a way that may have the effect of overriding local or state law.[91] As the Supreme Court explained, "Congress has unambiguously vested the Commission with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation [of what is a presumptively 'reasonable period of time' under Section 332(c)(7)(B)(ii)] was promulgated in the exercise of that authority."[92]

A deemed granted remedy would not render the judicial relief provisions of Section 332(c)(7)(b)(v) superfluous or inconsistent with Congressional intent. Even with a deemed granted remedy, applicants may still need to seek injunctive relief where a state or locality fails to act in order to compel the issuance of a permit, where needed. The language in Section 332(c)(7)(b)(v) does not "preclude" other remedies to remove barriers to deployment.[93]

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[89] CCA Comments at 11-13; AT&T Comments at 25-26; Crown Castle Comments at 33-34; Globalstar Comments at 12; Mobile Future Comments at 4-5; Sprint Comments at 22-27; T-Mobile Comments at 25; Verizon Comments at 23; WIA Comments at 3-4, 24, 61.

[90] *See, e.g.*, City of Alexandria, Arlington County, Fairfax County, and Henrico County ("Virginia Joint Commenters") Comments at 32-33.

[91] *See City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[92] *City of Arlington* at 1863.

[93] AT&T Comments at 26.

D. Declare that the Shot Clocks Apply to Municipal Poles and Rights of Way.

Given localities' assertion that they can unilaterally deny ROW access, it is essential for the Commission to confirm that the shot clocks do apply to facilities to be located in ROWs, including on muni-owned light poles and similar structures. CTIA urged the Commission to issue this ruling because of its concern that some localities were asserting "proprietary" rights over ROW access.[94] Comments of some localities underscore this concern because they assert they are acting in a proprietary capacity in the context of managing access to municipal poles and ROWs, and thus the shot clocks do not apply at all.[95] This is a significant issue because many localities do not have a process for small cell siting. Many are simply not acting for a variety of reasons, but there is no legal incentive for them to adopt a process. Shot clocks will provide that incentive. Municipal poles and ROWs are public property intended to serve as the locations for public services.[96] In such circumstances, municipal oversight serves a regulatory rather than proprietary function, and therefore Sections 332(c)(7) and 6409(a) – and the shot clocks that implement them – apply.

E. Declare that Requiring a Showing of a Coverage Gap or Other Business Need Violates Section 332(c)(7).

The record demonstrates that some localities continue to force carriers to prove that a particular site is needed to fill a coverage gap and that there is no feasible alternative site, or that the site will meet some business need.[97] CTIA agrees with commenters that ask the Commission

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[94] CTIA Comments at 43-46.

[95] *See e.g.*, Florida Coalition of Local Governments Comments at 10; League of Arizona Cities and Towns Comments at 9-10; Smart Communities Siting Coalition at 52-53.

[96] Sprint Comments at 34; T-Mobile Comments at 31-33.

[97] *See* AT&T Comments at 5; Mobile Future Comments at 3-4; Mobilitie Comments at 12-13, 17-18; Verizon Comments at 21-22; WIA Comments at 53; *but c.f.* Bowman, North Dakota Comments at 1; GlobalStar, Inc. Comments at 10-11.

to clarify that these requirements violate Section 332(c)(7)'s prohibition on regulations that "prohibit or have the effect of prohibiting" service. Today, the issue providers often face is not filling geographic coverage gaps, but providing sufficient capacity to accommodate rapidly increasing demand for wireless services. Small cells are optimal for adding capacity but may not necessarily fill coverage gaps due to their shorter propagation ranges. Forcing carriers to demonstrate a physical gap in coverage or that there is some other business need for a site at a particular location is thus tantamount to prohibiting service.[98]

VI. THE COMMISSION SHOULD EXCLUDE SMALL CELL FACILITIES FROM NEPA AND NHPA REVIEWS.

Commenters urge the Commission to limit the application of the National Environmental Policy Act and the National Historic Preservation Act to wireless facilities by excluding small cells. They document how the lengthy processes that NEPA/NHPA review require significantly delay small cell deployment, even though small cells do not typically raise environmental or historic preservation concerns.[99] Some commenters also highlighted how costly these lengthy and complex processes have become.[100] For example, the Commission's NEPA rules—which require applicants to prepare and file environmental assessments if certain conditions are met, even if there is no likelihood of an environmental impact—have "required Sprint to spend tens of millions of dollars to investigate a minimal likelihood of harm." Sprint estimates it has done NEPA checklists for 20,000 to 30,000 sites, but less than 250 required preparation of an environmental assessment, and "every single one of those environmental assessments resulted in

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[98] *See* Verizon Comments at 20-22; Mobilitie Comments at 10-13, 17-18.

[99] CCA Comments at 35-37; NTCH Comments at 1 (the review processes are having "deleterious effects on the speed and cost-effectiveness of tower construction"); NTCA Comments at 5 (the federal review process requires "inefficient and repetitive" studies).

[100] Sprint Comments at 47-48; CCA Comments at 35.

a finding of no significant impact."[101] Therefore, the Commission should invoke that authority to categorically exclude small cells from NEPA/NHPA reviews.[102]

As commenters request, the Commission should also exclude from NEPA review those wireless facilities that trigger that review only because they are located on floodplains, as other agencies can and do conduct their own reviews to protect against any damage to these sensitive areas.[103] Requiring providers to go through a duplicative Commission review needlessly adds costs and delays to investment in new infrastructure.

VII. CONCLUSION.

CTIA urges the Commission to act quickly to remove regulatory barriers to wireless infrastructure deployment that have the effect of slowing, or outright prohibiting, the delivery of mobile wireless services to consumers. Adopting the recommendations discussed herein will

[101] Sprint Comments at 47-48.

[102] CTIA appreciates that the Commission is considering these issues as part of its Wireless Infrastructure NPRM and looks forward to providing additional comments in that proceeding.

[103] T-Mobile Comments at 39-41; Verizon Comments at 38-39.

fully protect the interests of localities while expediting and modernizing the massive investment that is needed to provide all Americans with advanced wireless networks and services.

Respectfully submitted,

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